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Supreme Court of the United States

OCTOBER TERM, 1953

No. 249

LEVI DAL-SANTO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INDEX

Subject Index

	PAGE
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	5
Statement of the case	8
The facts	9
Reasons for granting the writ	15
I	15
II	18
III	20
IV	25
V	26
Conclusion	27

Cases Cited

Abramson, In re 195 F. 2d 261 ((3rd Cir.)	24
Annett v. United States No. 4632, 10th Cir., June 26, 1953	19, 25
Board of Education v. Rice (1911) A. C. 179	17

CASES CITED *continued*

PAGE

Cox v. Wedemeyer
192 F. 2d 920 (9th Cir.) 19

Denby and Sons v. Minister of Health
(1936) 1 K. B. 337, 342 17

Errington v. Minister of Health
(1935) 1 K. B. 249 17

Estep v. United States
327 U. S. 114, 121 ..... 20, 24

Hull v. Stalter
151 F. 2d 633, 635 (7th Cir. 1945) 22, 24

Knox v. United States
200 F. 2d 398 (9th Cir.) 21

Lapointe v. L'Association de Bienfaisance de la Police de Montreal
(1906) A. C. 535 17

Marriott v. Minister of Health
(1935) 154 L. T. 47, 50 17

Niznik v. United States
184 F. 2d 972, 974 (6th Cir.) 19

Phillips v. Downer
135 F. 2d 521, 525, 526 (2d Cir.) 25

Reel v. Badt
141 F. 2d 845, 847 (2d Cir.) 25

Rex v. Architects' Registration Tribunal
61 T. L. R. 445 17

Rex v. Paddington Rent Tribunal
(1949) K. B. 666 17

CASES CITED *continued*

	PAGE
Stafford v. Minister of National Health (1946) K. B. 621	17
Stanziale, Ex parte 138 F. 2d 312, 314	19
United States v. Bender No. 10,939, 3rd Cir., July 21, 1953	21
United States v. Clark 105 F. Supp. 613 (D. C. Pa. W. D.)	21
United States v. Evans (Ruling by Judge Hincks, D. C. Conn., July 13, 1953)	26
United States v. Everngam 102 F. Supp. 128 (D. C. W. Va. Oct. 31, 1951)	24
United States v. Graham 108 F. Supp. 794 (N. D. N. Y.)	20
United States v. Kose 106 F. Supp. 433 (D. C. Conn. 1951)	19
United States v. Laier 52 F. Supp. 392 (N. D. Calif. S. D.)	20
United States v. Nugent No. 540, October Term, 1952, June 8, 1953	3, 15, 16, 17, 18, 26
United States v. Packer 200 F. 2d 540 (2d Cir.)	21
United States v. Peterson 53 F. Supp. 760 (N. D. Calif. S. D.)	20
United States v. Romano 103 F. Supp. 597 (S. D. N. Y.)	20
United States v. Zieber 161 F. 2d 90 (3rd Cir.)	20

Statutes and Regulations Cited

	PAGE
Federal Rules of Criminal Procedure, Rules 37 (b) and 45 (a)	2
Regulations, Selective Service (32 C. F. R. §1602, *et seq.*)—Section:	
1622.10	19
1622.20 (a)	7
1624.2 (b)	19
1626.25	7
United States Code, Title 5, Section 1002 ("Administrative Procedure Act")	16
United States Code, Title 28, Section 1254 (1)	2
United States Code, Title 50, App. §§451-470 ("Universal Military Training and Service Act")—Section:	
6 (j)	2, 5
11	8
13 (b)	15
United States Constitution:	
Amendment I	22
Amendment V	3

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Levi Dal Santo, says that a writ of certiorari ought to issue to review the judgment of the court below. That court erroneously overruled important questions of law. The court also decided questions directly in conflict with decisions in other circuits by affirmance of the conviction.

Opinion Below

The opinion of the court of appeals [105-112][1] is not yet reported.

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

Jurisdiction

The judgment of affirmance was entered June 25, 1953. [105, 112] A petition for rehearing was filed in time. [113] It was denied on the 20th day of July, 1953. [114] This petition is filed in time and this Court has jurisdiction under 28 U. S. C. 1254 (1). See also Rules 37 (b) and 45 (a), Federal Rules of Criminal Procedure.

Questions Presented

I.

Section 6 (j) of the Universal Military Training and Service Act (50 U. S. C. App. §§451-470) provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, after appropriate inquiry, is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers (but is not bound to follow) that recommendation in reaching its decision.

The facts established by the undisputed evidence show that there was an extensive FBI report made when petitioner's case was investigated by the Department of Justice. This FBI report was referred to and used by the hearing officer following the hearing conducted by him and before his report was made. The FBI report admittedly was not furnished to petitioner by the hearing officer and was not included in the draft board file when the report of the hearing officer and the recommendation of the Department of Justice were made to the appeal board and the draft board file returned to the appeal board.

There was no request made by petitioner that he be given the FBI report. The hearing officer recommended against the conscientious objector claim. The information appearing in the FBI report was not made available to

petitioner. The information was adverse to petitioner. While the hearing officer reported that it was not unfavorable, the summary that he made of the FBI report shows that statements were made against petitioner. Even if the hearing officer did not rely on such unfavorable evidence, it is presumed that the appeal board relied upon the evidence.

The question presented, therefore, is whether the failure to produce the secret FBI report so petitioner could answer the unfavorable evidence and the failure of the Department of Justice and the Selective Service System to include the report in the draft board file violated the act, the regulations and the Fifth Amendment to the United States Constitution.

II.

The next question presented is whether the act and the regulations intend that the FBI report be placed in the file even when favorable to the registrant so that the appeal board have all the facts of the case on which to classify.

III.

The next question presented is whether the decision of this Court in *United States* v. *Nugent,* No. 540, October Term, 1952, should be reconsidered because it was erroneously decided.

IV.

A subpoena duces tecum issued to compel the production of the FBI report. It was quashed. Production of the FBI report would have enabled the trial court and the appellate court to determine whether the notice of adverse evidence was adequate.

Another question presented, therefore, is whether the trial court committed reversible error in quashing the

subpoena and refusing to compel the production of the FBI report.

V.

The undisputed evidence showed that petitioner was a conscientious objector. This appears from the statement of facts. The facts also show that the local board denied petitioner his right to a full and fair consideration of his conscientious objector claim because he was not a full-time minister. [42] The petitioner contended that the local board arbitrarily and capriciously denied him his conscientious objector status. [45-46] A motion for judgment of acquittal was made and extensively argued. [46] The motion was denied. [4, 13, 46] This question was presented to the court of appeals and it was answered against the petitioner. [105-112]

The next question presented, therefore, is whether the local board denied petitioner a full and fair hearing contrary to procedural due process and rejected all of his evidence showing he was a conscientious objector because he was not a full-time minister and would defend himself if attacked—entirely irrelevant factors.

VI.

The facts established by the undisputed evidence appearing in the draft board file, in the FBI report and in the evidence taken at the hearing before the hearing officer show that petitioner was a conscientious objector. [73-80, 88-93] The petitioner contended that the hearing officer arbitrarily and capriciously recommended against his conscientious objector status particularly because petitioner had become a conscientious objector after the draft law went into effect and because "his religious activities have been so recent, it is not clear that his conscientious objections are based entirely on his religious training and belief." [94]

The petitioner contended that this recommendation of the hearing officer was illegal, arbitrary, capricious and contrary to the law and the facts. This was raised at the argument of the motion for judgment of acquittal. [45-46] The motion for judgment of acquittal was overruled. [4, 13, 46] This question was presented to the court of appeals and it was answered against the petitioner.

The next question presented, therefore, is whether the recommendation of the hearing officer destroyed the draft board proceedings since he rejected the claim solely because petitioner became a conscientious objector after the draft law went into effect.

VII.

The facts established by the undisputed evidence appearing in the draft board papers and the testimony show that the petitioner was a conscientious objector to both combatant and noncombatant military service, and as such was entitled to deferment from all service under the act. The petitioner contended in his motion for judgment of acquittal and upon the argument thereof that the denial of the full conscientious objector status by the local board, the recommendation by the Department of Justice and the final classification by the appeal board were arbitrary, capricious and without basis in fact. [45-46] The motion for judgment of acquittal was overruled. [4, 13, 46] This question was presented to the court of appeals and it was answered against the petitioner.

The last question presented, therefore, is whether the denial of petitioner's conscientious objector claim was without basis in fact, arbitrary and capricious.

Statute and Regulations Involved

Section 6 (j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613) provides:[2]

[2] As amended by Section 1 (q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U. S. C. App., Supp. V, 456 (j)), Section 6 (j) of the Act of 1948 differs from the original provision quoted in respects which are here immaterial.

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be

assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendaion of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 1622.20 (a) of the Selective Service Regulations (32 C. F. R. §1622.20 (a)) provides:

> In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. §1626.25) provides:

> (c) The Department of Justice shall . . . make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be

sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

Statement of the Case

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§451-470). Petitioner was charged with failing and refusing to submit to induction contrary to the act. [2, 3, 6-7] On May 20, 1952, he pleaded not guilty. [4]

Petitioner caused to be issued and served upon the United States Attorney, the hearing officer of the Department of Justice and the agent in charge of the Chicago office of the Federal Bureau of Investigation a subpoena duces tecum. [5, 7-8] On the call of the case for trial,

September 23, 1952, the Government moved to quash the subpoena duces tecum. [3, 4, 14-15] Petitioner filed an affidavit showing the materiality and need of the FBI report made in his case. [10-11] The court sustained the motion to quash. [9-10]

The case proceeded to trial before the judge without a jury, which was waived. [3, 4, 5, 14-15] At the close of all the evidence petitioner made his motion for judgment of acquittal. [45] The motion for judgment of acquittal was overruled. [4, 13, 46] On September 23, 1952, the court found the petitioner guilty and rendered a judgment sentencing him to the custody of the Attorney General for a period of two years. [3, 4, 13-14]

On October 2, 1952, the notice of appeal was filed. [99-100] Time for filing the record was duly extended. [100-101] Statement of points was duly filed in the district court. [102-103] The case was duly briefed and argued in the court of appeals. [104-105] After submission the judgment of conviction was affirmed. [112-113] Then a petition for rehearing was filed. [113] This was denied. [114]

The Facts

Petitioner was born on December 21, 1929. [48, 50, 53] September 18, 1948, he registered with Local Board No. 54, Cook County, in Chicago. [49] A Selective Service classification questionnaire was mailed to him on September 22, 1950. [50] The questionnaire was properly filled out by him and returned to his local board on October 3, 1950. [23, 50] He gave his address in Chicago. [50-51] He showed that he was a minister of religion, regularly serving as such. He answered that he was ordained a minister of Jehovah's witnesses on August 3, 1950, after being in the ministry since October 10, 1949. [51]

In the questionnaire petitioner stated further that he was unmarried and employed by a television service concern. [52] He showed that he had completed eight years

of elementary school and four years of high school. [52] He neglected to sign Series XIV of the questionnaire requesting the local board to furnish him with a special form for conscientious objector. [53]

Accompaning the questionnaire were affidavits by Louis O. Manns [60-61], Harvey Cottam [61-62], Vincent A. Mancuso [62-63], Albert A. Hart [63-65], Joseph Mancuso [65-66], Sam S. Esposito [66-67], Theodore A. Savvas [67-68], Robert E. Mango [68] and William Narve [69]. These affidavits relate to the history of petitioner and his study and preparation for the ministry as one of Jehovah's witnesses. [60-69] In addition to the above affidavits petitioner also filed with the local board on October 3, 1950, a certificate with respect to his sincerity and training as a minister of religion which was signed by eighteen people. [70] These affidavits and the petition were mailed to the local board with a long letter from petitioner stating the history of his training for the ministry. [70-72]

In his letter to the local board accompanying the questionnaire petitioner stated that he attended the Theocratic Ministry School and Watchtower Study in addition to Bible studies in the homes of the people. He also showed that he preached from house to house and on the streets, and delivered Bible sermons from the pulpit. [70-71] He pointed out that he was a soldier for Christ Jesus and could not "engage in carnal warfare", because it meant "death at the hands of Almighty God". [71]

On October 12, 1950, the local board placed petitioner in Class I-A, making him liable for unlimited training and service in the armed forces. [23, 54] October 26, 1950, petitioner wrote a letter to the local board requesting a personal appearance. [25, 72] Nothing was done by the local board on the request by petitioner, but he was ordered to report for a preinduction physical examination on March 14, 1951. [54]

Petitioner was examined on March 27, 1951. He was found acceptable and mailed a notice thereof on April

4, 1951. [23, 54] On receipt of this notice petitioner again wrote the local board (April 7, 1951) reminding it that he had requested a personal appearance which had not been granted. [82-83] On April 13, 1951, he was ordered to appear before the board. [24, 54] A personal appearance and hearing was had. [27, 36, 54, 83]

A few days before the hearing petitioner filed his conscientious objector form with the local board. He explained in his correspondence with the local board the reason he had not filed the conscientious objector form previously was because of his lack of understanding and that it was not filed until after he "obtained the knowledge from the Bible". [37] The conscientious objector form was filed on March 26, 1951. [25, 73-79] The local board had before it the conscientious objector form at the time of the personal appearance. [40]

In this conscientious objector form petitioner stated that he was opposed to participation in war in any form. He claimed exemption from all military training and service and (in Series I (B) of the conscientious objector form) asked to be deferred under the act. [74] He stated that he believed in the Supreme Being and the nature of his beliefs involved duties superior to those arising from any human relation. [74] He said that he was in the army of Christ Jesus and that the weapons of warfare used by a Christian soldier are not carnal. He added that he was not authorized to engage in carnal warfare "of this world". He stated that he could not desert the forces of Jehovah God to become a soldier in any army of this world. He pointed out that he relied on Acts 5:29, which reads: "We must obey God rather than men." He explained Matthew 22:21 (the scripture on rendering unto Caesar the things that are Caesar's and unto God the things that are God's) as meaning that the obligations arising from human relationships should be complied with only when they agreed with the laws of God. [79-80]

In the special form for conscientious objector petitioner further showed that he had acquired his conscientious objections through regular Bible study in the "most efficient ministry school in the world". He added that, as a minister, he must continue studying even after being ordained. He gave the Watchtower Society as the person on whom he relied for religious guidance. [75] He explained that he believed in the use of force only in defense of himself and the "Kingdom interests". [75] He confined the use of force to defense when attacked and forced to protect himself and the "Kingdom interests". [75] He said he tried to ward off blows and attacks only in defense. He added that in defense he did not use weapons of warfare and that he would retreat when attacked on public or other property, shaking the dust off of his feet, because he did not want to give what is holy to dogs and throw pearls before swine. He added that he retreated for the purpose of avoiding a fight and trouble. He explained he would not, however, retreat when attacked in his own home or at a public meeting place. [80]

Petitioner also described the actions and behavior in his life which demonstrated his consistency and the depth of his convictions. He said that all of his life he respected God and feared him. He added that he received training through study of the Watchtower literature, beginning in 1948, that caused him to search deeply the Word of God. He said further that he had been regularly teaching the Word of God since he began the deep study. [80] He explained that he had expressed his beliefs and conscientious objections. [76] He added that he was wholly dedicated to God and was no part of this world "governed by political systems." He added also that he was conscientiously objecting to any type of service under the act. [80]

In the special form petitioner also gave his schooling. [76] He listed all of the occupations that he had pursued. [76] He gave a list of his residences and supplied the names and address of his parents, adding that they had

no religion. [77] He showed that he had never participated in any military organization and that the only organization that he was a member of was the Watchtower Society and Jehovah's witnesses. [77] He carefully described the official creed of Jehovah's witnesses against participation in war. [78, 80-81]

The local board denied the conscientious objector status to petitioner because he was not a full-time minister and, since he devoted most of his time to being a television serviceman, the board felt that he could not be a conscientious objector. The board ruled that, since he was not a minister, therefore "he could not be a conscientious objector." [42]

On May 1, 1951, the local board mailed to petitioner a notice of another 1-A classification, making him liable for unlimited military service. [54] The state director, on receipt of the complaint from the petitioner, wrote him to take his appeal to the appeal board. [85-86] Petitioner appealed his case to the appeal board on May 15, 1951. [54, 86-87] On that date his file was sent to the board of appeal. [54]

The appeal board on July 12, 1951, on preliminary consideration, made a tentative denial of the claim for classification as a minister and as a conscientious objector. [54] The next day the appeal board forwarded the file to the Department of Justice for an investigation by the FBI and a hearing before the hearing officer. The file was received by the Department of Justice on July 13, 1951. [88]

September 14, 1951, the FBI investigation was completed and the draft board file, together with the FBI report, was received by the hearing officer. [88] September 17, 1951, the petitioner was notified to appear before the hearing officer for a hearing. [88] September 20, 1951, the hearing was conducted. [88] The hearing officer made a report to the Department of Justice. [87-94]

In his report the hearing officer found as facts each and every one of the cardinal statements made by the

petitioner appearing in his conscientious objector form. [88-89] The hearing officer stated that the petitioner told him at the hearing he prayed at least two times daily and sometimes more. The hearing officer found that petitioner did not drink and had never been arrested or in trouble. Sixteen witnesses appeared at the hearing to corroborate petitioner's claims. [94] A summary of the salient facts testified by ten of these witnesses is made by the hearing officer. They all testified that registrant was sober and sincere, had correct habits, did not stay out late at night, did not smoke and did not drink. [90-91]

The hearing officer then turned to the FBI report and relied on the adverse information supplied by a Catholic priest at Zeigler, Illinois (the place where petitioner was born), the chief of police of Zeigler, his parents, a former employer, another former employer, four other persons, defendant's sister and half-brother, five other informants and four neighbors. [91-93]

The hearing officer concluded from the evidence that petitioner was baptized as a Catholic but for fifteen years had not been a practicing Catholic and became a member of Jehovah's witnesses in October, 1949, being ordained August 3, 1950. [93] He also concluded that the FBI report "developed no derogatory facts. His sincerity, character and habits are not questioned." [94] The hearing officer added that petitioner "made a very favorable impression upon the Hearing Officer." [94] The hearing officer, nevertheless, recommended that, because (1) "his religious zeal coincides with general discussion of the draft", and (2) "his religious activities have been so recent, it is not clear that his conscientious objections are based entirely on his religious training and belief", petitioner should be classified in Class I-A. [94]

The Department of Justice adopted the report of the hearing officer and recommended to the appeal board that the petitioner be placed in Class I-A, making him liable for full military service. This recommendation was, therefore, against his claim as a conscientious objector. [95-96]

The appeal board accepted the recommendation and (December 18, 1951) classified petitioner in Class I-A. [55] January 18, 1952, he was ordered to report for induction February 5, 1932. [55, 97] He reported on that date. [55] He refused to submit to the induction according to the report of the recruiting officer at the induction station "on the grounds that he is a 'conscientious Objector', a 'Minister' of the 'Jehovahs Witnesses' religious group, and that according to their doctrines he was opposed to becoming a member of the Armed Forces of the United States". [98]

At the trial the petitioner testified that the reason he delayed the filing of the conscientious objector form and did not request it in the questionnaire was because he lacked knowledge. He said, "The conscientious objector was later. I obtained the knowledge from the Bible." [36-37] He stated he became a full-time minister of the Watchtower Society November 1, 1951. [37] He testified also about his reasons for refusing to submit to induction. The main reason was that he did not want to break covenant with Almighty God, whom he sought to please rather than man, because "life is at stake". [34]

Reasons for Granting the Writ

I.

The court below approved the failure to produce the secret FBI report to petitioner at his hearing and the use of it by the hearing officer. The holding is based on *United States* v. *Nugent*, No. 540, October Term, 1952, decided June 8, 1953, by this Court. The *Nugent* decision is erroneous and the Court is here requested to reconsider it and overrule that decision. See the petition for rehearing filed in that case, now undetermined.

Production of the FBI report and making it a part of the draft board file is required by Section 13 (b) of the act (62 Stat. 623, 50 U. S. C. App. §463(b).) This section

makes applicable Section 3 of the Administrative Procedure Act (5 U. S. C. §1002). This act requires all matters of official record to be made available to persons concerned. The Court in the *Nugent* opinion overlooked this specific requirement stated by Congress.

It should be noticed that no summary or epitome of the FBI report was given to petitioner. He had no notice of any kind of adverse evidence in the report. A summary of the FBI report was made by the hearing officer to the appeal board. This was after the hearing. Petitioner never saw it until his case was tried in the district court, which was too late. The report of the hearing officer to the appeal board contained the summary of the unfavorable evidence. Notwithstanding this the hearing officer said there was nothing unfavorable in the report. This statement was impeached by his summary to the appeal board. It must be assumed that the appeal board relied on the unfavorable evidence.

The *Nugent* decision is erroneous because it reaches a false conclusion. It is said that the hearing officer gives the registrant a summary of the FBI report. There is no provision for this. Since the opinion rests primarily on this false conclusion it should be reconsidered.

Here petitioner did not request that the FBI report be produced at the hearing. His failure to ask for it is not a waiver because the regulations of the department made no provision for the FBI report to be had. The procedure prohibited production of it. Since it was legally impossible to get the FBI report on request it cannot be said that the point is waived because it was not requested. It was the duty of the hearing officer and the department under the Constitution to produce the FBI report without a request for it by petitioner.

Due process of law requires standards of fairness to be given by administrative agencies equal to that commanded by the English law at the time of the adoption of the Constitution. English law at that time and now

condemns the procedure approved by the Court in the *Nugent* case. The holding of this Court in the *Nugent* case conflicts with *Rex* v. *Architects' Registration Tribunal*, 61 T. L. R. 445; *Errington* v. *Minister of Health*, (1935) 1 K. B. 249; *Board of Education* v. *Rice*, (1911) A. C. 179; *Lapointe* v. *L'Association de Bienfaisance de la Police de Montreal*, (1906) A. C. 535; *Marriott* v. *Minister of Health*, (1935) 154 L. T. 47, 50; *Stafford* v. *Minister of National Health*, (1946) K. B. 621; *Rex* v. *Paddington Rent Tribunal*, (1949) K. B. 666 and *Denby and Sons* v. *Minister of Health*, (1936) 1 K. B. 337, 342.

This Court is sworn to administer the common law as it existed in England at the time the Constitution was adopted. The law of procedural due process stated in the above cases is precedent for this Court to follow and they outlaw the conclusion reached by the Court in the *Nugent* opinion. The *Nugent* decision should be overruled. To that end the petition should be granted in this case.

To permit petitioner to see and answer the unfavorable evidence in the FBI report is not litigious interruption of the draft procedure. It would take only a few minutes to read and answer it at the hearing. Since a fair hearing was contemplated by Congress the brief interruption of the procedure long enough to read and answer the report was contemplated by Congress. It was not a litigious interruption because subpoena of witnesses and cross-examination of them was not contemplated or demanded by petitioner.

A point of great importance was overlooked in the *Nugent* case. It is called to the attention of the Court again. It is that Congress intended that the appeal board have all the facts. Since all the facts cannot be had by the appeal board until it has examined the FBI report it is a violation of the intent of Congress to keep the report back and provide only what the department chooses to give to the appeal board when it makes its recommendation.

Even if the Court does not reconsider the *Nugent* decision the petition in this case should be granted because

a distinction exists here. In this case the report of the hearing officer shows that there was adverse evidence in the FBI report. The summary made by the hearing officer shows it. This is true even though he said there was nothing unfavorable in the secret report.

The need of a reconsideration of the *Nugent* decision and the presence of unfavorable evidence in the secret report present two important questions of law that ought to be determined in this case. These are, therefore, grounds for granting the writ of certiorari.

II.

The court of appeals held that the denial of a full and fair hearing by the local board upon the personal appearance was harmless error. This was error. The holding conflicts with decisions by other courts of appeal.

The local board rejected the evidence offered by petitioner on his conscientious objector claim. The rejection was based on the grounds that petitioner was not a full-time minister. The court below said: "Of course a conscientious objector need not be a full-time minister." Without any factual basis the court of appeals concluded that the board was not talking about the conscientious objector claim, but the claim for classification as a minister of religion, when it held he was not a conscientious objector because he was not a full-time minister.

It was a denial of due process of law when the court of appeals went out of the record and made a finding in contradiction of the facts. There was no evidence that the board chairman made a mistake when he testified. Yet the court of appeals found that he made a mistake.

The basis for the finding was that petitioner discussed his ministerial status at the hearing. There was no testimony given by the chairman that this discussion misled the chairman. We must take the testimony and the English language used by him for what it says. It says: conscientious objector status, not ministerial status, was

what they considered to be waived because he was not a full-time minister. See the record at page 52. The record settles it.

Section 1622.10 of the regulations required the board to consider both claims for classification. So did Section 1624.2 (b), regulating the hearing. See *Cox* v. *Wedemeyer*, 192 F. 2d 920 (9th Cir.), with which the holding of the court below conflicts.

The court below should not have indulged in a speculation and then found a fact that did not exist. It was bound by the presumption of regularity of administrative proceedings. This forces the conclusion that the board followed the law and considered both claims and that the basis for the denial of the conscientious objector claim was that petitioner was not a full-time minister. The logical and legal conclusion thus reached impeaches that of the court below.

The court below also approved rejection of petitioner's evidence and denial of a full and fair hearing upon personal appearance because the belief of petitioner in self-defense forfeited his claim as a conscientious objector. Refusal to hear and consider the evidence showing conscientious objection on this ground is a denial of procedural due process. The holding of the court below on this point conflicts with *Annett* v. *United States*, No. 4632, decided by the United States Court of Appeals for the Tenth Circuit on June 26, 1953.

The holding of the court below approving the rejection of evidence by the local board on personal appearance by employment of irrelevant and immaterial factors conflicts with a holding by another court of appeals. See *Niznik* v. *United States*, 184 F. 2d 972 at page 974, where consideration of an immaterial factor on the minister-of-religion claim was held to be a denial of procedural due process. Compare *United States* v. *Kose*, 106 F. Supp. 433 (D. C. Conn. 1951). See also Ex parte *Stanziale*, 138 F. 2d 312 at page 314, with which the holding conflicts. There was

rejection of evidence in petitioner's case upon personal appearance. This was a denial of procedural due process of law.

The court below held that the classification by the local board was final and therefore finality of the statute cured the procedural error. Had the complaint been that the local board illegally classified petitioner the holding would be right. But it is the denial of procedural rights rather than classification by the local board that is the grievance here. Denials of procedural rights are not protected by finality provisions of the Act. See *Estep* v. *United States*, 327 U. S. 114 at page 121.

The court below also held that the classification by the appeal board made immaterial and irrelevant the denial of a full and fair hearing by the local board. This holding conflicts with *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir.); *United States* v. *Romano*, 103 F. Supp. 597 (S. D. N. Y.); *United States* v. *Graham*, 108 F. Supp. 794 (N. D. N. Y.); *United States* v. *Peterson*, 53 F. Supp. 760 (N. D. Calif. S. D.); *United States* v. *Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.).

The appeal board considered only the classification. It has no jurisdiction and is not concerned with procedural errors. There is no provision in the regulations for the appeal board to remand the case to the local board because of error. This is a gratuitous privilege of the state director and the national director. Since neither exercised the right to have the administrative irregularities of procedure corrected, the denial of the full and fair hearing by the local board is a question that is not cured and it is not made harmless error through the classification by the local board or the appeal board.

III.

The court of appeals approved the denial of the conscientious objector claim by the appeal board based on the report of the hearing officer solely because petitioner

was a latecomer to the faith of Jehovah's witnesses. The court held that to acquire conscientious objections after the draft law went into effect was grounds for proper denial of the claim. Had Congress intended to freeze conscientious objectors and confine the exemption to those having objections before the Act, it would have said so. The mere absence of such an element from the act rejects the holding of the court below. The holding is, therefore, an important question of federal law that ought to be reviewed by this Court.

The holding of the court below on this point conflicts with the holdings of *United States* v. *Packer,* 200 F. 2d 540 (2d Cir.), and *Knox* v. *United States,* 200 F. 2d 398 (9th Cir.). Compare *United States* v. *Clark,* 105 F. Supp. 613 (D. C. Pa. W. D.). In *United States* v. *Bender,* No. 10,939, decided by the Court of Appeals for the Third Circuit on July 21, 1953, the court said:

"A registrant might possibly become a bona fide conscientious objector after his original Form 100 had been filed and prior to induction, but that is not the problem confronting us."

When the local board considered Dal Santo's case they took it as though he had filed his conscientious objector form in time. The chairman of the local board did not rely on his late filing for a denial of the conscientious objector claim. The sole reason for denial was his failure to be a full-time minister. [42]

The board of appeal, in making the final I-A classification, accepted and followed the recommendation of the Department of Justice. [54-55, 93-94, 95-96] The hearing officer in his report recites the ultimate facts established by the undisputed evidence. [88-93] The hearing officer specifically found that petitioner believed it was contrary to the Scriptures to engage in carnal warfare and that he did not believe in the use of force except in the case of self-defense. [89] He found that petitioner "has a consciousness to commit no offense against God or man".

[89] He specifically said that petitioner "conscientiously objects to serving in any military establishment or any civilian substitute for military service". [89] He rejected all the evidence corroborating the petitioner's conscientious objections to war. [89-93] He found that the FBI report "developed no derogatory facts". [94] He added that his "sincerity, character and habits are not questioned". [94] After finding that the evidence showed petitioner to have conscientious objections to war, the hearing officer arbitrarily and capriciously rejected the undisputed evidence because petitioner was a late convert of Jehovah's witnesses and a newcomer to conscientious objector status. [94]

It has been held that a nonexempt registrant can change his status after he registers and before final classification.—*Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir. 1945), at page 635, with which the holding below conflicts.

The hearing officer relied upon arbitrary and capricious grounds for denial of petitioner's claim as a conscientious objector. He said that the petitioner was formerly a Catholic but quit the Catholic Church. This has no relevancy whatever to the claim for classification as a conscientious objector based on the beliefs of Jehovah's witnesses. The mere fact that the petitioner recently came to a knowledge of the truth of God's word as taught by Jehovah's witnesses is of no consequence. The undisputed evidence showed that he was one of Jehovah's witnesses at the time of his final classification by the local board on the occasion of his personal appearance. The evidence showed that he was a conscientious objector on that date. There was no dispute of such contention. There was nothing whatever to dispute in any way the evidence filed by petitioner showing that he was a conscientious objector.

It is a part of the basic fabric of the nation that the people have freedom of religion guaranteed by the First Amendment of the Constitution. This constitutional guarantee not only gives freedom of worship in the religion

of one's choice but also pertains to changes to another religion. This freedom to change churches or views is inherent. Congress certainly intended to protect the freedom. The hearing officer was unauthorized by Congress and prohibited by the Constitution to penalize the petitioner because he changed his religion.

No one questioned the good faith of the petitioner in becoming one of Jehovah's witnesses. His good faith in becoming one of Jehovah's witnesses is not disputed in the evidence. There is absolutely no evidence whatever that he fictitiously or fraudulently assumed the robe of conscientious objection believed by Jehovah's witnesses for the purpose of evading military service. The conscientious objector form, the affidavits of the witnesses and the evidence given by some of the witnesses before the hearing officer completely corroborated his bona fide beliefs as one of Jehovah's witnesses.

It is arbitrary and capricious for the hearing officer to reject all the undisputed evidence purely because petitioner was a latecomer to Jehovah's witnesses. Religions of all denominations are constantly acquiring new converts and losing old worshipers. There is a constant turnover of membership among the various religions. This is going on in time of war as well as in time of peace. Since the practice is not criticized and the change of religions is not evidence of bad faith in time of peace, then by force of the same reason a change of religion from a nonpacifist group to a religion believing in conscientious objection is valid and lawful. This change cannot be held to be *per se* fraudulent or in bad faith.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact the petitioner to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of the petitioner's evidence was on illegal and irrelevant grounds. The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recom-

mendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave the petitioner a 1-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error.—See *United States* v. *Everngam*, 102 F. Supp. 128 (D. C. W. Va. Oct. 31, 1951).

If the late filing of the claim for conscientious objection is *per se* basis in fact for the denial of the claim, then Section 1626 of the regulations about change of status is meaningless. Suppose a man was a father but also a judge. He refuses and fails to show his status as a father in his questionnaire and relies on his exemption as a judge. He then, at the personal appearance, brings to the attention of the draft board that he is a father. How would anyone have the audacity to say that in such situation he would not be entitled to claim classification as a father? In the case of In re *Abramson*, 195 F. 2d 261 (3rd Cir.), the court held that the change of status could be drawn to the attention of the draft board at any time before induction. This was the same holding that the court below made in *Hull* v. *Stalter*, 151 F. 2d 633.

Now, why should the rule be any different here, especially in view of the fact that the entire record points to the bona fide claim of conscientious objection? The hearing officer did not dispute any of the facts supporting the claim. Are we to say that the mere late filing of the claim is *per se* evidence of its falsity? If so, then the basis-in-fact doctrine pronounced in the *Estep* case (327 U. S. 114) has been thrown to the four winds and we are all—the courts included—powerless to reach draft boards.

The holding below giving freedom to the hearing officer to find against Dal Santo on grounds outside the law con-

flicts with *Reel* v. *Badt*, 141 F. 2d 845 (2d Cir.). In that case the court said: "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S.* v. *Kauten*, 133 F. 2d 703." (141 F. 2d, at page 847) See also *Phillips* v. *Downer*, 135 F. 2d 521 (2d Cir.), at pages 525-526.

IV.

The uncontradicted documentary evidence submitted by the petitioner establishes that he had sincere and deep-seated conscientious objections as one of Jehovah's witnesses against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation". This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code", but that it was based upon his religious training and belief as one of Jehovah's witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

The holding of the court below conflicts directly with the holding of the Court of Appeals for the Tenth Circuit in *Annett* v. *United States*, No. 4632, decided June 26, 1953. In that case the court said:

> "The record is devoid of a single act, word or any conduct by Annett or of the testimony of any witness to a single fact which would tend to show that Annett was not a member in good faith of the Jehovah witness religious organization with religious convictions against participation in war. A careful analysis of the record compels the majority to conclude that there is a complete lack of any substantial evidence to support the conclusions and of the board and its order was therefore void. * * * Since the record is devoid of any evidence sustaining the finding of the board that Annett

was not a member in good faith of Jehovah's witnesses, possessed of an honest religious conviction against participation in war, the judgment cannot stand and it is, therefore, not necessary to separately inquire whether there is evidence sufficient to support the finding that he was not a minister of the Jehovah witness faith."

V.

The necessity to produce the FBI report at the trial to test the resumé provided for in the *Nugent* decision is a substantial question that ought to be decided by this Court. Recently Judge Hincks, Chief Judge for the District of Connecticut, held that it was necessary for the FBI report to be produced at the trial. This ruling was made on July 13, 1953, in *United States* v. *Evans*, still pending. Judge Hincks said:

> "Now I cannot say in the present state of the record that that was a fair resumé. Maybe it was. Maybe it wasn't. If the report were submitted in response to subpoena, I could make a ruling as to whether it was a fair resumé or not. And unless it is submitted and unless I find that it was a fair resumé, I think it must follow that the Government has failed to prove that the classification was valid."

This Court should determine this very important federal question, now magnified by the decision of this Court in the *Nugent* case, so that the federal courts may properly perform their judicial function. The courts cannot determine whether a resumé is fair without seeing the FBI report. It cannot be seen without it being produced. Its production cannot be compelled without subpoena. The proper subpoena in this case was improperly quashed. The importance of this question commands that this Court grant the writ in this case.

Conclusion

For the reasons stated, it is submitted that this petition for writ of certiorari should be granted.

Respectfully,

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